EUI DEPARTMENT OF LAW

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Villa Salviati, Via Bolognese 156
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26th Annual EU Competition Law and Policy Workshop

# Substantive Tests in EU Competition Law: The Emerging Judicial Framework

## I. The work of the General Court

1. The Workshop began with an exchange of views with the head of cabinet of the President of the General Court on the Court's policy and on its management of its existing workload.
2. The reférendaire explained that the General Court faced three major challenges:
   - The increasing complexity of cases, including a number of big and sensitive cases in the digital sector;
   - the need to take decisions in relation to fast-moving markets on a time-scale which is still relevant to the competition problems at the origin of the cases concerned;
   - the potential transfer from the Court of Justice of the EU to the General Court of competence for judgments on certain categories of requests for preliminary hearings.
3. The Workshop acknowledged the substantial progress made by the Court in improving the speed and quality of its examination of cases. The Court had recognized the rationale for a more economic and effects-based approach. But it was aware that such an approach could be heavily resource-intensive and could often put pressure on the work of judges who were not specialised either in competition law or economic analysis. The recourse to independent economic experts was helpful but the general view within the Workshop was that the Court should exploit as much as possible the confrontation of the testimonies of the experts of the parties rather than having recourse to appointment of its own experts.
4. A number of interventions during the discussion also drew attention to the need for more consistency between of Court judgements across its various chambers, in particular in terms of the depth of their review of individual cases. More generally, the Court faced the issue of where it should place the cursor between a relatively light ,or full, review of legal issues and economic effects. In this respect, there was obviously a balance to be achieved between the speed and the quality of its handling of cases.

## II. Article 101.

1. With respect to the framework for judicial review of enforcement under article 101, the Workshop took note of the evolving case law on restrictions by object. The European Courts' guidance tended towards a restrictive view of the categories of agreements which could be regarded as *per se* anticompetitive. At the same time they had recognized in *Cartes Bancaires* and earlier judgements that the assessment of an agreement by competition authorities needed to take into account the wider economic context in which the agreement was being applied: the characteristics of the market concerned, the dynamic of competition on the

market, and the possible contribution of the agreement to the achievement of wider objectives which were pro-competitive. In isolation, some agreements could look anticompetitive but were in the wider scheme of things, fully justified (cf. the reference by judges to ensure that the fish- the anticompetive agreement- is really a fish).

2. A number of participants to the Workshop expressed the view that the object/effects distinction was primarily a procedural device. On the one hand, it allowed competition authorities to pursue cases by object where it could claim that the agreement involved did not justify a significant investment of investigative resources because its anti-competitive effects were 'obvious'. On the other, it allowed a distinction to be made between the burden of proof required to prove an agreement was anti-competitive, which was clearly for the competition authority, and that required to exempt an agreement under article 101(3) which was for the parties.
3. Others suggested that a better approach to the assessment of agreements under article 101 would be to ignore the object/effects frontier and recognise that there was a continuum of situations from one extreme, where on the basis of historical evidence, an agreement , such as bid-rigging, could clearly be regarded as anticompetitive, to the other, at which an agreement could be regarded as procompetitive or where efficiencies and other procompetitive features more than outweighed its anti-competitive aspects.
4. This however raises the issue as to whether, how and when article 101(3) can ever be applied. Since the 2004 Modernisation of the EU competition rules, the Commission had provided little guidance on article 101(3), preferring to concentrate its efforts on assessing whether an agreement was anticompetitive by object or effect and leaving it to the parties to provide an article 101(3) justification, which the Commission rarely accepted. The workshop took the view that this approach was unbalanced. Block exemptions, such as those for horizontal and vertical agreements provided firms with solid safe harbours. But the Commission should also be prepared to give guidance, and/or issue advisory letters or amicus briefs on what kind of situations could lead to a positive assessment of an agreement under 101(3). This was particularly important where it was necessary to balance anticompetitive and procompetitive aspects in situations which were not clear-cut.
5. In this context, the attention of the workshop was drawn to the implications of the *Wouters* judgment which addressed situations where an agreement could be justified on the basis of public policy goals such as professional standards. It was underlined that exemptions granted on this basis should nevertheless take into account the extent to which the agreements were explicitly condoned or indeed encouraged by public policy. This could not obviously cover agreements where governments simply wanted prices to be fixed (cf. *Irish Beef*). The aim was to protect consumers against anticompetitive harm while taking into account legitimate non-economic goals. As far as sports activities are concerned, there was also a need to analyse what precise rules are needed to allow competitive events while not resulting in excessive restriction between commercial undertakings and consequent harm to consumers.

## III. Article 102

1. The workshop turned its attention in the next session to case law developments under article 102. Reference was made to the ECJ's recent judgements on *SEN et al* and on *Intel*, in which the Court aimed to set out the conditions under which the conduct of an undertaking can be regarded, on the basis of its anticompetitive effects as constituting abuse of a dominant position. Both the ECJ and the general Court had progressively embraced a more effects-based and economic approach to article 102 cases. They had given prominence to the need to assess whether the effects of a firm's conduct were capable of excluding competitors and whether the conduct was compatible with competition on the merits.
2. In this context, the Courts had addressed the issue of use of a so-called 'as efficient competitor (AEC) test'. Their assessments so far had moved in the direction of treating the AEC as a useful principle to gauge whether a firm's conduct could be regarded as consistent or not with the concept of competition on the merits. However according to recent judgments, AEC should not be regarded as a test which in itself could absolve a firm's conduct from action under article 102. A more comprehensive competition assessment of the alleged abuses was necessary. Some participants particularly stressed the need for competition authorities to investigate the impact of a dominant firm's behaviour not only on price but also on choice and innovation in the short and long term and of the potential for a firm to use its market power, not necessarily to completely foreclose competitors but to limit their expansion on the market ('keep small').
3. The Workshop also took note of the recent policy brief by Commission staff, the Commission's revision of the 2008 paper on enforcement priorities and its announcement of its intention to publish Guidelines on the application of article 102. The Commission's publication in 2008 of its guidance paper on enforcement priorities was acknowledged within the Workshop as a major step forward in setting out a logical structure of analysis to guide 102 case work. Despite its shortcomings, it had provided firms with a greater degree of certainty and predictability with respect to the Commission's enforcement action. It had embraced an effects-based approach to investigation, based on the objective of acting to avoid anti-competitive foreclosure leading to consumer harm, and it placed investigators under the obligation to identify a solid theory of harm, backed up by equally solid facts and evidence.
4. As a consequence, the EU Courts, and national competition authorities and courts, had duly taken account of its prescriptions, even though the Commission was not legally bound by its definition of enforcement priorities and despite the fact that national action under article 102 and its national equivalents was more focussed on exploitative abuses, which the guidance paper did not cover. The paper had also significantly influenced enforcement in jurisdictions outside the EU.
5. The revisions which the Commission had recently made to the guidance paper were limited but there was some criticism that they weakened the Commission's approach and reduced legal certainty, for example by allowing for the possibility that article 102 action could be undertaken to protect less efficient competitors or admitting the possibility of partial foreclosure of competitors as a starting point for enforcement action. Given that the revised paper would constitute the basis of the Commission's proposed new Guidelines, and that these would be binding on the Commission, it was nevertheless understandable that the Commission's

revisions represented a natural concern on its part to preserve the scope of its discretion in applying article 102 to new cases.

6. A number of participants in the workshop used the opportunity here to reemphasise the importance of predictability in Commission enforcement action. Given the size and visibility of action taken against very large and frequently global firms, attention should be paid to legitimate expectations. It was understandable that these firms needed to know when their conduct was likely to be exposed to allegations of anticompetitive conduct. Fining policy should arguably differentiate more between cases to take into account situations where theories of harm were relatively novel and where firms could not have intentionally condoned conduct which was subsequently characterised as anticompetitive.
7. In addition the Workshop stressed that effective enforcement action under article 102 should include close attention to the effectiveness of remedies rather simply than assuming that a heavy fine will automatically have a curative effect on the dynamic of competition on the market. Moreover given the fact that abusive conduct of big tech firms would also be subject to control under the Digital Markets Act, there was a need to ensure consistency across the different instruments at the Commission's disposal.
8. The Workshop finally discussed in this session the issue as to whether action under article 102 should take into account other public policy goals such as privacy, data protection or even unfairness in trading practices. It was recognised that some dominant firm's policies and conducts on these issues could be elements contributing to anti-competitive foreclosure and should be taken into account in 102 action. However it was not the task of competition authorities to weigh up the contribution of their action to different policy goals. They devoted their enforcement to action under the competition rules. Protection of consumers in areas as privacy should be dealt with by legislation dedicated to those areas.

## IV. Merger Control

1. In relation to merger control, there has been increasing volume of mergers and acquisitions which have been appealed, either on procedural or on substantive grounds. The focus of Court attention has naturally been on the interpretation of the notion, in the EU, of 'a significant impediment of effective competition' or , in the UK and the US, on 'a substantial lessening of competition'.
2. In all these jurisdictions, the trend so far driven by competition authorities has been to move away from a too formalistic and structural approach based on market definition, market share thresholds and the concept of dominance. The notion of closeness of competitor has been highlighted in particular in the revised UK Merger Guidelines, although it is unclear up to now that the UK courts would necessarily embed the notion of closeness into the SLC test. In addition emphasis has been placed on industry-specific analysis. However the US policy may seek a new balance between structural factors and behavioural factors.
3. In all three jurisdictions, the assessment of effects of a merger includes an analysis of the underlying competitive dynamic in the markets concerned (closeness, the number of competitors, the importance of ecosystems, the existence of mavericks…) and the identification of credible theories of harm. It was also suggested that capability audits of competitors can make a useful input

to understanding competition dynamics and to devising effective divestment remedies.

4. Efficiencies appear to be rarely significant in the final assessment of a mergers. US policy is tending to move to an assumption of zero efficiencies and a widening of the potential theories of harm. Internal documents are regarded as a key source of information about the likely effects of a merger The UK CMA is reluctant to accept quantitative evidence from the parties. Most judges in the US also take a sceptical view on quantitative analysis.
5. A previous focus of merger enforcement on horizontal effects has at the same time given way to concerns about vertical and conglomerate mergers. US Courts, rather than the agencies, will nevertheless be sceptical about theories of harm where there is simply a possibility but no clear probability of anticompetitive effects. A counter-example in the UK has been the acceptance by the CAT of the CMA's competition analysis without any clear theory of causation between the merger and anticompetitive effects.
6. As to the EU SIEC test, investigations ultimately focus on significance (eg of a price increase and of effects in specific sectors compared to others). This also affects the assessment of efficiencies. Anticompetitive effects in specific areas may have to be weighed against efficiencies which relate to the benefits of the entire transaction. Interestingly, the UK CMA's interpretation of the word 'substantial' in the SLC test has not been assigned any particular threshold, and given the authority's scepticism on quantitative evidence (and particularly GUPPI analysis) there is little likelihood of any change in this approach.
7. With respect to the assessment of efficiencies, it was also acknowledged that competition agencies may be reluctant to make explicit mention of them in decisions given that estimates of future efficiencies require some element prediction of effects which may or may not materialise for a variety of reasons. The agencies would then have to some extent owned the prediction and became partially responsible for it. It was nevertheless noted that authorities did not generally show any similar caution about predictions of anticompetitive effects (which are in any case frequently difficult to quantify).
8. The Workshop expressed some concern about the degree of divergence across different jurisdictions between the results of competition investigations and the final decisions imposed. There were clear differences in procedure and deadlines linked to the examination of the same case by different jurisdictions. These were also sometimes justified by specific effects in different territories. However there were divergences in the handling of mergers on global markets. The US and UK tended to prohibitions rather than accepting any kind of commitments. In the US, there are now some instances where the courts are nevertheless prepared to enforce commitments. More generally, the objective of all competition authorities to make markets work better would arguably militate in favour of close cooperation on the content of any remedies that they are all prepared to accept.
9. Finally, the Workshop addressed some of the more radical proposals which were now circulating, such as reversing the burden of proof to the parties that the transaction is not anti-competitive. There was a renewed call within the Workshop for a closer analysis of whether past enforcement decisions were in fact ineffective in all sectors in preserving competition and protecting consumers. Moreover much could be done to rectify underenforcement without any radical reform of merger control systems. This does not however absolve governments and competition authorities for the need for rigorous work on the past

effectiveness of merger control decisions in order to guide future enforcement and continuously improve efficiency and effectiveness.

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